STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED PUBLIC EMPLOYEES, LOCAL 790, SEIU, AFL-CIO Charging Party, v. SAN FRANCISCO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. SF-CE-1114 PERB Decision No. 688 June 27, 1988

Appearances: Ronald A. Glick for the San Francisco Community College District.

Before Hesse, Chairperson, Porter and Shank, Members.

DECISION

SHANK, Member: This case is before the the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Francisco Community College District (District) to the decision of the administrative law judge (ALJ). United Public Employees, Local 790, SEIU, AFL-CIO (Local 790 or SEIU), the exclusive representative for classified employees, alleged that the District unilaterally adopted a policy barring classified personnel who worked in the District from also serving as certificated employees, in violation of sections 3543.5(a), (b), (c), and (d) of the Educational Employment

Relations Act (EERA or Act).[1] The ALJ dismissed the unfair labor practice charge on the ground that, because SEIU is the exclusive representative for classified employees working in the District, subjects related to employees in their capacity as certificated employees are beyond its scope of representation. While we affirm the ALJ's dismissal, we reach our conclusion for different reasons, as set forth below.

PROCEDURAL HISTORY

On July 21, 1986, SEIU filed a charge alleging unfair practices by the District. On November 26, 1986, the

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[1]The EERA is codified at Government Code section 3540, et seq., and is administered by the PERB. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5 provides in relevant part that it shall be unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

San Francisco Community College Federation of Teachers, AFT 2121 (Federation) filed its own charge alleging unfair practices by the District based on the same set of operative facts, discussed below. Both associations alleged that the District unilaterally adopted a policy barring classified personnel working in the District from also serving as certificated employees. A consolidated hearing was held on January 29, 1987.[2] Separate decisions were issued.

FACTUAL SUMMARY

The District had, for a number of years, employed as certificated employees individuals who also held classified positions within the District.

Certificated employees of the District are represented by the Federation and are covered by a bargaining agreement between that union and the District. Local 790 was voluntarily recognized by the District as the exclusive representative of classified employees in February 1986.

The District admits that it adopted a new policy, which is the subject of this dispute, in a statement issued by the District's chancellor on June 24, 1986. The policy prohibited full-time classified employees from part-time employment as certificated employees. This represented a change from the

[2]This decision is limited to Case No. SF-CE-1114 which was filed by SEIU. The charge filed by the Federation is designated as Case No. SF-CE-1146.

past practice of the District. This new policy had three parts: (1) classified employees without certificated Spring 1986 assignments would not be granted any such assignments in the future; (2) classified staff who worked in certificated positions in Spring 1986 could be given such assignments in Fall 1986 only, with none thereafter; and (3) certificated assignments for classified employees in Fall 1986 could not exceed the number of hours assigned in Spring 1986. Full implementation of the part-time certificated staff policy was delayed to Spring 1987 because "staffing difficulties" were anticipated.

The District, in unilaterally foreclosing the opportunity for classified employees to work in the certificated positions, desired to avoid the payment of overtime implicated by this Board's decision in San Francisco Community College District (1986) PERB Order No. Ad-153. In San Francisco Community College District, supra, the District was found by the Board to be the employer of the classified employees working within the District.[3] In the District's opinion, the Board's order finding that the District was the employer of classified employees, coupled with the Fair Labor Standards Act's dual-capacity salary requirements, would have subjected the District to overtime liability, which it wanted to avoid.

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[3]The District in San Francisco Community College District (1986) PERB Order No. Ad-153, asserted that the City and County of San Francisco was the exclusive employer of classified employees, and not the District.

DISCUSSION

The ALJ, in his proposed decision, held that, while PERB has jurisdiction over the instant complaint, the subject at hand is related solely to certificated staff and therefore beyond the scope of representation for the classified employee union. The ALJ concluded that, since this issue was dispositive, it was unnecessary to reach the other defenses put forth by the District and dismissed the complaint.

Notably, the ALJ, by way of footnote, stated that:

> The jurisdictional defense apparently raises issues involving fundamental subject matter jurisdiction, as well as the exercise of the PERB's discretionary jurisdiction. The core question of subject matter jurisdiction has been answered in the aforementioned PERB Order No. Ad-153, although the application of that jurisdictional precedent depends on the exercise of the Board's discretion to draw boundary lines dividing the PERB's jurisdiction under the EERA from matters which fall under the Meyers-Milias Brown Act. As stated above, the present dispute can be resolved without engaging in such a complex line-drawing exercise.

While we agree that this complaint should be dismissed, we disagree with the ALJ's rationale for doing so.

A threshold question, which the ALJ did not address, is whether the District is a public school employer of classified employees within the meaning of EERA section 3540.l(k). For the reasons which follow, we conclude that the District is not a public school employer of classified employees.

In San Francisco Community College District (1986) PERB Order No. Ad-153 the Board concluded that the District is the

joint employer of classified employees along with the City and County of San Francisco and, since the District is a public school employer within the meaning of the Act, PERB has jurisdiction to hear unfair practice complaints affecting classified employees.

The Board's rationale in support of its conclusion was that the record failed to substantiate the District's claim that it is a "mere department" of the city and therefore cannot be a "public school employer" to classified employees within the meaning of EERA section 3540.l(k). In addition, the Board took official notice of several cases involving certificated employees before PERB, where the District had defended itself without claiming a jurisdictional defense.

The District argued that Education Code sections 88000 and 88137, when read together, exempt it from the requirements of EERA with regard to classified employees because the District lies wholly within a city and county. The Board rejected this argument on the ground that it did not comport with legislative intent.

The Board stated that:

> In our view, all section 88000 purports to do is exempt the District from the requirements of certain sections of the Education Code. EERA, however, is part of the Government Code. Neither Chapter 1 nor Chapter 4 pertains to collective bargaining. Neither section 88000 nor section 88137 refers to EERA or the jurisdiction of PERB and, clearly, neither specifically exempts the District from the requirements of EERA. . . .

> The District relies on the language of section 88137 primarily to support its second, related argument. It contends that the classified employees are subject solely to the Charter, which in turn makes the City's civil service system the sole regulatory scheme for its classified employees and, thus, the City the true employer of Barnes. . . .
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> Again, such a broad reading of section 88137 is not warranted; indeed, the final provision of the section leads to a contrary conclusion. It says that the governing board of the District shall have the right to fix the duties of its employees. As we read the section, therefore, it does not establish the District's classified personnel as employees of the City; rather, it expressly refers to those workers as employees of the District, and affirms the District's authority, as the employer, to direct the employees in their work. (Fn. omitted.) (PERB Order No. Ad-153), pp. 11-12.)

Finally, the Board embraced the theory of a "joint employer" relationship in support of maintaining jurisdiction when it said:

> We agree, and conclude that the District and the City each possess employer authority. While the City and/or Commission appears to control fundamental matters of wages and hours, it remains clear from Education Code section 88137 and Charter section 5.104 that the operation and management of the school system, including the power to fix and assign duties of classified employees, is reserved solely to the governing board of the District. (PERB Order No. Ad-153, p. 16.)

We believe that PERB Order No. Ad-153 is incorrect and that PERB does not have the authority to exercise jurisdiction in matters involving classified employees working in the District. The Board in PERB Order No. Ad-153 misinterpreted

the clear language of Education Code sections 88000[4] and, particularly, 88137[5] as it relates to the city charter; nor did the Board give due regard to prior PERB precedent regarding the elements establishing "joint employer" status. Moreover, in finding jurisdiction to exist under those circumstances, the Board, in effect, defeated the very purpose of EERA inasmuch as the constraints of the city charter (which controls wages, hours and other terms and conditions of employment) place those subjects beyond the control of the District, and thereby preventing the opportunity to conduct meaningful negotiations over subjects within scope.

The sole statutory support advanced by the Board in PERB Order No. Ad-153 for the position that the District is also the employer of classified employees depends on the construction of

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[4]Education Code section 88000 states in pertinent part:

Application of provision to classified employees

. . . . . .

These provisions shall not apply to employees of a community college district lying wholly within a city and county which provides in its charter for a merit system of employment for employees employed in positions not requiring certification qualifications.

. . . . . .

5Education Code section 88137 states:

In every community college district coterminous with the boundaries of a city

a single word used in a very limited context in the Education Code. Education Code section 88137 grants the District the right to fix the duties of "its" employees. The Board stated that use of the word "its" denotes a legislative recognition of the employer-employee relationship between the District and classified employees who perform services for it. That word, the Board reasoned, combined with a legislative failure to specifically exempt the District from the provisions of EERA, constitutes sufficient legal authority to extend PERB's jurisdiction to those classified employees.

Our revisiting the relevant provisions of the Education Code leads to the conclusion that the District is not the employer of classified employees. We note that classified employees of the District have a unique status under the law. The first paragraph of Education Code Section 88000 provides that a multitude of Education Code provisions apply to both merit and non-merit school districts. When those provisions are examined, virtually every statute governing employment of classified employees, except those pertaining to the merit

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> and county, employees not employed in positions requiring certification qualifications shall be employed, if the city and county has a charter providing for a merit system of employment, pursuant to the provisions of such charter providing for such system and shall, in all respects, be subject to, and have all rights granted by, such provisions; provided, however, that the governing board of the district shall have the right to fix the duties of all of its noncertificated employees.

system, is included. According to the second paragraph of section 88000, however, these same provisions do not apply to noncertificated employees of the District due to its coterminous boundaries with the city.

The question becomes, then: What provisions are not covered under the first paragraph, and thus would apply to the District? Of those articles not specifically excluded, the only article of any substance is Article 3, governing merit districts. As the District pointed out in its post-hearing brief, within Article 3 is section 88137, which states that as long as San Francisco's charter provides for a merit system, classified employees of the district "shall in all respects, be subject to, and have all rights granted by, such [charter] provisions; . . ." (Section 88137, emphasis added.) The only exception is that the district has the right to fix duties.

As a result of the combined reading of sections 88000 and 88137, the only statutory power granted to the District with regard to "its" classified employees is the right to assign duties. The employees themselves enjoy none of the Education Code benefits and protections given to all other classified school employees in the State of California. Rather, they must look to San Francisco's charter and civil service rules. PERB is not empowered to grant the District any additional authority over those employees. Such a grant of authority must come from the San Francisco charter.

EERA defines "public school employee" as "any person employed by any public school employer . . . ." (Gov. Code sec. 3540.l(j); emphasis added.) As set out, supra, since the charter provides that classified employees are employees of the City and County of San Francisco and the city is clearly not a public school employer, classified employees are not public school employees within the meaning of EERA.

The fact that the District has voluntarily recognized Local 790 is irrelevant. PERB is an administrative agency of limited jurisdiction. Administrative agencies "have only such powers as have been conferred on them, expressly or by implication, by constitution or statute." (Ferdig v. State Personnel Bd. (1969) 71 Cal.2d 96, 103.) "An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. (Citations omitted.)" (Ferdig v. State Personnel Bd., supra, at p. 104; accord City and County of San Francisco v. Padilla (1972) 23 Cal.App.3d 388, 399-400.) In jurisdictional matters, parties cannot, by their act of recognition, create jurisdiction where none exists under statute.

To read Education Code sections 88000 and 88137 as giving jurisdiction to PERB in this instance would do violence to the Legislature's intended purpose of EERA which, to be sure, is ". . . to promote the improvement of personnel management and employer-employee relations within the public

school systems . . . ."; but this charge is tempered by our recognition that nothing contained in EERA:

> . . . shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements. (Gov. Code sec. 3540.)

This Board's prior conclusion, in Ad-153, that the District is the joint employer of classified employees is contrary to well-established Board precedent. In Alameda County Board of Education and County Superintendent of Schools of Alameda County (1983) PERB Decision No. 323, the Board concluded that a joint employer relationship was not established. The Board reasoned:

> EERA subsection 3540.l(k) states:
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> "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.
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> This subsection, like section 2(2) of the National Labor Relations Act (NLRA), is a jurisdictional definition identifying the types of agencies subject to PERB jurisdiction. To determine whether an agency so listed is an employer in a given instance, it is appropriate to consider whether the alleged employer has such "sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." See National Transportation Service, Inc. (1979) 240 NLRB 565 [100 LRRM 1263]. (Emphasis added.) See also North American Soccer League v. NLRB (1980 613 F.2d

> 1379 [103 LRRM 2976]; cert. den. (1980) 449 U.S. 899 [105 LRRM 2737], ("existence of joint employer relationship depends on the control which an employer exercises, or potentially exercises, over the labor relations policy of the other"). (Footnote omitted.) (Id., at p. 14.)

The record supports that, with regard to classified employees, the District does little more than assign duties to classified employees. The city, through the Civil Service Commission, exercises control over hiring, wages, hours of work, suspension and dismissal, health and welfare benefits, leave and transfer policies, performance evaluations, grievance procedures, safety equipment and uniforms and uniform allowances. All of these indicia of employment are prescribed by civil service rules, regulations and the Salary Standarization Ordinance.

In Herbert Harvey, Inc. v. NLRB (1969 D.C. Cir.) 424 F.2d 770 [72 LRRM 2213], the NLRB concluded that Herbert Harvey, Inc., a contractor which provided janitorial services to the World Bank, was a joint employer of the janitors.[6] Herbert Harvey, Inc., petitioned the court of appeal to reverse the NLRB's finding, while the NLRB petitioned the court of appeal

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[6]Throughout its litigation, Herbert Harvey Inc. took the position that the World Bank was the employer of the maintenance workers and, due to the Bank's status as an international organization, it was immune from the NLRB's jurisdiction.

to enforce its order. The court of appeal granted the NLRB's petition for enforcement after concluding that substantial evidence supported the NLRB's decision.

In affirming the NLRB, the Court of Appeal reasoned that:

> . . . [t]he paramount question is whether enough authority over labor relations is lodged in such a contractor to enable a satisfaction of bargaining obligations under the Act . . . ." (Id., at LRRM 2219.)

In reviewing the NLRB's analysis of the extent to which Herbert Harvey, Inc. was involved in an employment relationship with the janitors, the court observed that:

> The Board recognized that the Bank has to some extent participated in the hiring and firing of employees. It acknowledged that the Bank approves promotions and year-end wage increases but saw from the evidence that the Bank routinely agrees to them. But despite so much of an interlinking relationship between the Bank and Harvey over the employees, the Board found that primary control of the employees was vested by the contract in Harvey and was actually exercised by Harvey. In the Board's judgment, "[s]o far as the record reveals, the extent of [Harvey's] acquiescence in the World Bank's participation in the hiring, discharge, and assignment of employees was no more than that which any service company would permit in order to please its clients, and the World Bank's participation in promotions and the setting of wage scales was no more than an exercise of its right to police the costs being incurred under the contract." "Indeed," the Board observed, "for the World Bank to have participated to any great degree in the employment conditions of the employees would be to interfere with [Harvey's] obligation to obtain and retain the competent employees necessary to render the efficient and economical service which it

> was hired to provide under the contract with the World Bank." Thus the Board was led to "conclude that [Harvey!] exercises effective control over the working conditions of its employees and is fully competent to bargain with the Union in accordance with the provisions of the Act." (Id., at LRRM 2218 [fns. omitted].)

We adopt the NLRB's reasoning in Herbert Harvey, Inc., in that, the standard for joint-employer status that the NLRB looked to was the indices of control from which the authority over labor relations rests. On the facts before us, unlike Herbert Harvey Inc., the District has no remarkable indices of control. We conclude that the classified employees represented by SEIU are employees of the City and County of San Francisco. We so conclude because, here, the District's assignment of duties to classified employees is nothing more than an exercise of its right to insure that work is accomplished in the best interests of the District. By far and away, the primary control of the employees is actually exercised by the City and County of San Francisco. Accordingly, we overrule PERB Order No. Ad-153 to the extent that it is inconsistent with the views expressed herein.

ORDER

For the foregoing reasons, the unfair practice charge in Case No. SF-CE-1114 is DISMISSED.

Chairperson Hesse and Member Porter joined in this Decision.